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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

v.

STATE OF FLORIDA, and LAWTON CHILES,
Governor of Florida,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against states for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution?

II.

Does the *Ex parte Young* doctrine permit suits against a state governor for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution?

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Seminole Tribe of Florida, is a federally recognized Indian Tribe. The Seminole Tribe seeks certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit which held that Congress lacked the power to abrogate state Eleventh Amendment immunity under the Indian Commerce Clause.

OPINIONS BELOW

The opinion and judgment of the Eleventh Circuit, entered on January 18, 1994, is reported at 11 F.3d 1016 (11th Cir. 1994) and is reprinted in the Appendix at pages 1a-25a. The State of Florida's Motion for Rehearing was denied without comment on April 6, 1994. App.

86a. The order of the United States District Court for the Southern District of Florida, entered on June 18, 1992, denying the State of Florida's Motion to Dismiss, is reported at 801 F. Supp. 655, and is reprinted in the Appendix at pages 26a-42a. The district court's order on summary judgment motions, entered on September 22, 1993, reprinted in the Appendix at pages 43a-83a, is on appeal to the United States Court of Appeals for the Eleventh Circuit, but that appeal has been stayed pending disposition of proceedings in this Court. Order of April 28, 1994; (App. 84a-85a).

STATEMENT OF JURISDICTION

The judgment and opinion of the Eleventh Circuit were entered on January 18, 1994. App. 1a. On April 6, 1994, the Eleventh Circuit denied the State of Florida's petition for rehearing and suggestion for rehearing *en banc*. App. 86a. The petition for certiorari is being filed within 90 days of that denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3:

> The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATUTES

Section 2710(d)(7) of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, provides:

> (A) The United States district courts shall have jurisdiction over—
>
> > (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith. . . .
>
> . . . .
>
> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

Section 2710, the portion of the statute relevant to this case, is reprinted in full in the Appendix at pages 87a-100a.

STATEMENT OF THE CASE

The Seminole Tribe of Florida sued the State of Florida and its Governor on September 19, 1991, asserting jurisdiction primarily under 25 U.S.C. § 2710(d)(7)(A)(i); (App. 97a). The essence of the suit was that the State and the Governor had "failed to respond in good faith to the Tribe's request for compact negotiations and have not conducted those negotiations in good faith." Compl. at ¶ 24.

The Indian Gaming Regulatory Act ("IGRA"), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166-1168), requires Indian Tribes to compact with a state in order to conduct class III gaming—gaming that is neither social or traditional class I gaming, nor within the various bingo, pull tab and card games which are authorized as class II gaming under the statute. Class III gaming on Indian lands

is lawful if authorized by a tribe located in a state that permits such gaming, and "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ." § 2710(d)(1); (App. 93a). Congress provided a remedy if the Tribal-State compact negotiations fail to achieve an accord:

> (A) The United States district courts shall have jurisdiction over—
>
> > (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith. . . .
>
> . . . .
>
> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

§ 2710(d)(7)(A)(i) & (B)(i); (App. 97a).

The Seminole Tribe sued the State of Florida and its Governor pursuant to Congress' jurisdictional mandate and 28 U.S.C. § 1331 (federal question jurisdiction). The State and the Governor moved to dismiss on Eleventh Amendment sovereign immunity grounds. The district court denied their motions, *Seminole Tribe of Florida v. Florida*, 801 F. Supp. 655 (S.D. Fla. 1992); (App. 26a-42a), stating:

> Given Congress' plenary authority over Indian relations, explicitly noted in the text of the Constitution at Article I, § 8, cl. 3, and the uniquely federal issues raised when such authority is exercised, considered in conjunction with the principles enunciated by the Supreme Court in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), we conclude that Congress, when acting pursuant to the Indian Commerce Clause, has the power to abrogate the States' immunity.

801 F. Supp. at 658; (App. 32a).

The State and the Governor appealed to the Eleventh Circuit.[1] The *Seminole* case was consolidated with *Poarch Creek Indians v. Alabama*, No. 92-6244. In that case, the district court had granted the State's and the Governor's Eleventh Amendment motions to dismiss. The Eleventh Circuit reversed the *Seminole* decision and affirmed the *Poarch Creek* decision, concluding that the Indian Commerce Clause did not provide Congress with the power to abrogate the State's Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1028-29 (11th Cir. 1994); (App. 22a, 25a).

The Eleventh Circuit found that Congress clearly "manifested its intent to abrogate the states' immunity" under IGRA. 11 F.3d at 1024; (App. 14a). The court held "that Congress enacted IGRA solely under the Indian Commerce Clause," but then concluded that the Indian Commerce Clause does not permit Eleventh Amendment abrogation. 11 F.3d at 1026; (App. 18a). The court's rationale rejected the relevance of *Pennsylvania v. Union Gas Co.*, 401 U.S. 1 (1989), questioning its viability and drawing a distinction between Congress' powers under the Interstate Commerce Clause (*Union Gas*) and the Indian Commerce Clause. 11 F.3d at 1026-28; (App. 18a-22a).

The court of appeals noted that its conclusion regarding Congress' Eleventh Amendment abrogation power con-

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[1] Jurisdiction in the court of appeals was based upon the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). *See Griesel v. Hamlin*, 963 F.2d 338 (11th Cir. 1992) (denial of Eleventh Amendment immunity is an immediately appealable order); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, —— U.S. ——, 113 S.Ct. 684 (1993) (collateral order doctrine permits immediate appellate review of orders denying claim of Eleventh Amendment immunity).

flicted with the Eighth Circuit decision in *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993) (11 F.3d at 1023, n.5; App. 12a, n.5), and noted the conflict among district courts on the same issues. 11 F.3d at 1024, nn. 6 and 7; (App. 13a, nn. 6 and 7).

The Eleventh Circuit also rejected application of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to the Seminoles' suit against the Governor of Florida. The court concluded that the suit was really against the state itself, making *Ex parte Young* inapplicable, and that a decision to negotiate with a tribe is a "discretionary act" outside the mandate of *Ex parte Young*. 11 F.3d at 1028-29; (App. 23a-24a).

After rejecting all bases for federal jurisdiction under IGRA's aegis, the court of appeals created a remedy "for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit." 11 F.3d at 1029; (App. 25a). The court's remedy was that the tribe can notify the Secretary of the Interior of the state's failure to negotiate and objection to jurisdiction, and "[t]he Secretary then may prescribe regulations governing class III gaming on the tribe's lands." *Id.* That remedy prompted Florida's Motion for Rehearing, despite its Eleventh Circuit Eleventh Amendment success. Rehearing was denied. Order of April 6, 1994; (App. 86a).

This petition for certiorari seeks review of the court of appeals' decision which precluded the Seminole Tribe from asserting federal court jurisdiction over Florida and its Governor for not negotiating in good faith as required by the Indian Gaming Regulatory Act.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW EXPRESSLY CONFLICTS WITH THE DECISION OF THE EIGHTH CIRCUIT IN *CHEYENNE RIVER SIOUX TRIBE v. SOUTH DAKOTA*, 3 F.3d 273 (8th Cir. 1993), AND PRESENTS THE IMPORTANT AND UNANSWERED QUESTION OF CONGRESS' POWER TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY UNDER THE INDIAN COMMERCE CLAUSE

The Eleventh Circuit was unequivocal:

> We hold that, although decisions of the Supreme Court demonstrate that Congress does possess the power to abrogate the states' Eleventh Amendment sovereign immunity in certain cases, Congress did not possess that power when enacting IGRA under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

11 F.3d at 1019; (App. 2a).

> Having determined that Congress enacted IGRA solely under the Indian Commerce Clause, we now must determine whether the Indian Commerce Clause permits Congress to abrogate the states' Eleventh Amendment immunity. We conclude that it does not.

11 F.3d at 1026; (App. 18a).

The Eleventh Circuit acknowledged there was no doubt Congress intended to abrogate the State's immunity, but concluded:

> That intent cannot be given effect, however, as Congress did not possess the power to abrogate the states' immunity when it enacted IGRA.

11 F.3d 1024; (App. 14a).

The court of appeals acknowledged that this Court has not yet addressed the abrogation power in the context of legislation enacted pursuant to the Indian Commerce Clause. It recognized that section 5 of the Fourteenth Amendment and the plenary power over Interstate Com-

merce, article I, section 8, clause 3, provide a basis for abrogation, citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989),

> [but] [t]he Court has not yet found that Congress possesses the power to abrogate the states' sovereign immunity when legislating under any other provisions of the Constitution.

11 F.3d at 1023; (App. 13a).

This case presents the Court, under the Constitution's Indian Commerce Clause, with that important, but unanswered question. The importance of the question is underscored by the historically sensitive nature of the relationship between the federal government and Indian tribes, and by Congress' attempts to address conflicts between states and tribes pursuant to its plenary power to regulate commerce with the Indian tribes under article I, section 8, clause 3 of the Constitution. The Indian Gaming Regulatory Act is a quintessential example of Congress' delicate balancing to accommodate the rights and needs of tribes and states. The Act was prompted by *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which left Indian gaming unregulated:

> In an attempt to supply some much-needed regulation, and after contentious debate concerning the appropriate state role in the regulation of Indian gaming, Congress enacted the Indian Gaming Regulatory Act.

11 F.3d at 1019; (App. 3a).

Survival of the Act's central promise to the tribes—a remedy for a state's failure to engage in good faith negotiations—will resolve constitutional, statutory, and conflicting decisional doubts. *Compare Kickapoo Tribe of Indians v. Kansas*, 818 F. Supp. 1423 (D. Kan. 1993) (IGRA abrogates Eleventh Amendment immunity), with *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 800 F. Supp. 1484 (W.D. Mich. 1992); *Ponca Tribe of*

Oklahoma v. Oklahoma, 834 F. Supp. 1341 (W.D. Okla. 1992); *Spokane Tribe of Indians v. Washington*, 790 F. Supp. 1057 (E.D. Wash. 1991) (no Eleventh Amendment abrogation under Indian Commerce Clause). The Eleventh Circuit expressly acknowledged its conflict with the Eighth Circuit on the IGRA abrogation issue:

> One sister circuit, in determining that the Eleventh Amendment did not bar suits under IGRA, mentioned that the state had "actively engaged in negotiating tribal-State compacts and ha[d] reaped the benefits from these negotiations." *See Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273, 281 (8th Cir. 1993) ("Cheyenne II"), *aff'g* 830 F. Supp. 523 (D.S.D. 1993) ("Cheyenne I"). As the Eighth Circuit Court of Appeals primarily rested its decision on the fact that Congress had abrogated the state's Eleventh Amendment immunity, an argument we discuss (and reject) in part III.B., below, it is not clear how much weight the court gave to the state's participation in negotiations. To the extent that the Eighth Circuit relied on South Dakota's negotiations as a basis for finding a waiver of sovereign immunity, we respectfully disagree.

11 F.3d at 1023, n.5; (App. 12a, n.5). That continuing federal court controversy over IGRA and the Eleventh Amendment is another reason for granting certiorari.

The decision below unequivocally presents important constitutional issues. Review, and resolution of those issues, will also provide direction and stability to Indian tribes throughout the nation seeking to benefit from Congress' primary purpose in enacting IGRA:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

25 U.S.C. § 2702(1).

For all those reasons, certiorari should be granted.

II. THE DECISION BELOW PRESENTS A CONFLICT IN PRINCIPLE WITH *PENNSYLVANIA v. UNION GAS CO.*, 491 U.S. 1 (1989)

The decision below found *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), to be the case "most relevant" to the issue of whether the Indian Commerce Clause "permits Congress to abrogate the states' Eleventh Amendment immunity." 11 F.3d at 1026; (App. 18a). The *Union Gas* plurality concluded that since the Commerce Clause:

> withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not "unconsenting"; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.

491 U.S. at 19-20.

The decision below rejected *Union Gas*, distinguishing it as only applicable to the Interstate Commerce Clause, not the Indian Commerce Clause. Neither *Union Gas* nor the language of the Commerce Clause suggests that the ratification analysis permits interstate and Indian commerce to be treated differently for Eleventh Amendment abrogation purposes. Although the clauses "have very different applications," *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), the difference favors abrogation under the Indian Commerce Clause.

The Interstate Commerce Clause allows Congress to limit state action to maintain free trade among the states. *Id.* "[T]he central function of the Indian Commerce

Clause is to provide Congress with *plenary* power to legislate in the field of Indian affairs." *Id.* (emphasis added) (citations omitted). The states' acceptance of Congress' plenary power in Indian affairs lends more, not less strength to the Seminole Tribe's argument that Congress, in IGRA, had the power to abrogate Eleventh Amendment immunity. Through the Indian Commerce Clause, the States relinquished all authority over Indian affairs to the federal government. Thus, the central government exercises not only plenary, but exclusive authority over Indian affairs, sufficient to empower Congress to abrogate the States' Eleventh Amendment immunity. *Union Gas* is consistent with that claim. The decision below conflicts with *Union Gas*. That is an independent basis for granting certiorari.[2]

III. THE DECISION BELOW CONFLICTS WITH *EX PARTE YOUNG*, 209 U.S. 123 (1908), OR PRESENTS AN IMPORTANT UNANSWERED QUESTION UNDER THAT DOCTRINE

The *Ex parte Young* fiction permits an injunction against a state officer to force compliance with federal law. The Seminole Tribe's suit against the Governor of Florida—the State official deemed responsible for negotiating an Indian Gaming Regulatory Act compact—invokes the doctrine.

The Act creates a cause of action and federal court jurisdiction for "failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A)(i); (App. 97a). Once the Governor admits he is "the State" for compact negotiation purposes, he, like Attorney General Young, becomes a defendant whose presence vitiates Eleventh Amendment

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[2] The court of appeals' doubts about the continued viability of *Union Gas* permeated its opinion. We submit that these doubts need not be resolved under the construct we posit, because the Indian Commerce Clause provides surer footing for abrogation than does the Interstate Commerce Clause.

problems. Therefore, the court may order him to cease illegal actions—i.e., his continuing refusal to negotiate in good faith. *See* 209 U.S. at 155-56.

The court below held the *Ex parte Young* doctrine inapplicable because it incorrectly believed that how and whether to negotiate is subject to gubernatorial discretion. 11 F.3d at 1028-29; (App. 23a-24a). But IGRA allows the Governor no such discretion. The Act provides that upon receiving a compact request, "the State *shall* negotiate with the Indian tribe in good faith . . . ." 25 U.S.C. § 2710(d)(3)(A) (emphasis added). The court was not asked to compel the Governor to exercise any discretion, but only to determine, in light of the present factual record, whether his behavior complied with IGRA requirements.

The lower court's analysis thus fails to address the relief authorized by IGRA and sought below: a ruling that the State has not negotiated in good faith and an order that it do so. 25 U.S.C. § 2710(d)(7)(B)(iii); (App. 98a). If a governor still refuses to participate in good faith negotiations, then IGRA remedies can proceed under the authority granted to the Secretary of the Interior. The process requires no further participation by either a state or its governor. 25 U.S.C. § 2710(d)(7)(B)(iv)-(vii); (App. 98a-99a).

Moreover, contrary to the Eleventh Circuit's conclusion (11 F.3d at 1029; App. 24a), the Governor is the proper defendant. The Florida Governor's authority, as the State's chief executive officer, to conduct compact negotiations with the Seminole Tribe is unquestioned.

Congress' plenary constitutional power to compel states to cooperate with tribes imposes a duty upon a state and its officials that arises from the states' duty to conform to the Constitution. *Ex parte Young* provides the basis for enforcing that duty by suing the responsible state official in federal court. 209 U.S. at 159. It similarly provides the basis for enforcing a state's duty to abide by

Congress' mandate under the Indian Commerce Clause of the Constitution. If *Ex parte Young* does so provide, the decision below conflicts with that doctrine, and the lower court should have provided the relief contemplated by IGRA. If the application of *Ex parte Young* in this context is not clear, this case presents an important unsettled question of the ability of the federal courts to provide the relief contemplated by the Indian Gaming Regulatory Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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